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Henson v. International Paper Co.: A Step Backwards in South Carolina Attractive Nuisance Jurisprudence

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HENSON V. INTERNATIONAL PAPER CO.: **A STEP BACKWARDS IN SOUTH CAROLINA ATTRACTIVE** **NUISANCE JURISPRUDENCE**

I. INTRODUCTION

On April 25, 1998, ten-year-old Terry Henson (Terry) and three other boys entered International Paper Company's (IPC) property in the City of Georgetown.¹ IPC operates a twenty-seven mile canal on this piece of land and uses several pumping stations to aid in water flow.² This water eventually finds its way to the Church Street pumping station in the City of Georgetown where it is sent underground through piping at 19,000 gallons per minute.³ The canal is mostly unfenced and is easily accessible via dirt maintenance roads.⁴ No signs forbidding trespassing or warning of the dangers associated with the canal are erected.⁵

The boys entered the land on one of the maintenance roads to see a "dirt jumping hill."⁶ After viewing the hill, they went to the adjacent canal where each of them walked over a pipe spanning the canal's water to the other side.⁷ Terry decided to enter the water holding on to one end of a cast net the boys found; the other three boys held the other end.⁸ While in the water, Terry attempted to grab the metal bracings on the pipe he traversed earlier.⁹ The ten-year-old slipped, the other boys were unable to hold onto the net, and Terry drowned under the forceful pull of the Church Street pumping station.¹⁰ At the time of Terry's death, IPC knew of at least three other people who drowned in the canal.¹¹

Terry's mother brought an action for wrongful death alleging, *inter alia*, that she was entitled to recover against IPC under the attractive nuisance doctrine.¹² The trial judge granted a directed verdict for IPC on the attractive nuisance issue and submitted the plaintiff's negligence cause of action to the jury.¹³ The jury found Terry 75% at fault and IPC 25% at fault, resulting in a judgment for defendant IPC.¹⁴ Terry's mother appealed.¹⁵ In a 2-1 decision, the South Carolina Court of Appeals affirmed the trial verdict.¹⁶ Judge Anderson dissented.¹⁷

1. Henson v. Int'l Paper Co., 358 S.C. 133, 136, 594 S.E.2d 499, 500 (Ct. App. 2004).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. Henson v. Int'l Paper Co., 358 S.C. 133, 136, 594 S.E.2d 499, 500 (Ct. App. 2004).

8. *Id.*

9. *Id.*

10. *Id.* at 136, 594 S.E.2d at 501.

11. *Id.*

12. *Id.* at 135, 594 S.E.2d at 500.

13. Henson v. Int'l Paper Co., 358 S.C. 133, 136, 594 S.E.2d 499, 501 (Ct. App. 2004).

14. *Id.* at 137, 594 S.E.2d at 501.

15. *Id.*

16. *Id.* at 143, 594 S.E.2d at 504.

17. *Id.*

II. BACKGROUND

A. *A Brief History of the Attractive Nuisance Doctrine in the United States*

The attractive nuisance doctrine has its roots in England in the 1840s,¹⁸ with American courts first applying the doctrine in the 1870's.¹⁹ The early cases were often referred to as "turntable cases" because early decisions centered on the same factual scenario: children sustaining injuries while playing on railroad lines' unlocked turntables.²⁰ The doctrine's name eventually evolved to "attractive nuisance":

The courts decided that when a landholder sets before young children a temptation that he has reason to believe will lead them into danger, he must use ordinary care to protect them from harm

On the basis of the turntable decisions, the doctrine acquired the misleading name "attractive nuisance." The word "nuisance" was used because of a supposed analogy to conditions dangerous to children outside the premises. The word "attractive" was applied because courts regarded it as essential that the child be lured or enticed onto the premises.²¹

In 1922, the United States Supreme Court decided *United Zinc & Chemical Co. v. Britt*.²² The Court held that a child could not recover under the attractive nuisance doctrine when he was not lured onto the defendant's property by the instrumentality causing his injury.²³ *Britt* served as the majority rule in the United States for a little over a decade, but its acceptance by courts quickly declined.²⁴ In 1934, the *Restatement of Torts* rejected *Britt*'s reasoning outright by adopting section 339.²⁵ Section 339, which afforded a child "much of the protection of [the] ordinary negligence doctrine,"²⁶ proved to be one of the most well received sections of the *Torts Restatements*.²⁷ Under section 339, a child no longer had to prove that his initial trespass was caused by the instrumentality that would ultimately cause his injury.²⁸

In 1965, the *Restatement (Second) of Torts* republished section 339 with only minor changes.²⁹ Prosser and Keeton stated, "[s]ection 339, . . . has been cited so frequently, and has received such general acceptance on the part of the courts, that it has become the new point of departure."³⁰ Now, in most states, instead of looking to the child's attraction to the instrumentality causing the harm, the courts will

18. W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 59, at 400 (5th ed. 1984) (citing *Lynch v. Nurdin*, 113 Eng. Rep. 1041 (Q.B. 1841) as the doctrine's beginning).

19. VICTOR E. SCHWARTZ ET AL., PROSSER, WADE AND SCHWARTZ'S TORTS 496 (10th ed. 2000).

20. *Id.*

21. *Id.*

22. 258 U.S. 268 (1922).

23. *Id.* at 275-76.

24. KEETON, *supra* note 18, at 401-02. It may have been overruled. *Id.* at 401 & n.14.

25. *Id.* at 402.

26. *Id.* at 401-02.

27. *Id.* at 402.

28. *Id.*

29. KEETON, *supra* note 18, at 402.

30. *Id.* at 402.

decide whether the child's harm was reasonably foreseeable by the defendant in deciding whether to award recovery.³¹ Since a majority of courts have now adopted a negligence standard in attractive nuisance cases, it appears that the doctrine's title has become both misleading and fictitious.³²

B. The Attractive Nuisance Doctrine in South Carolina and Henson

South Carolina started applying the attractive nuisance doctrine shortly after its arrival in the United States. The doctrine's first application is found in *Bridger v. Asheville & Spartanburg Railroad Co.*,³³ a railroad turntable case.³⁴ The South Carolina Supreme Court did not use the words attractive nuisance or identify the turntable doctrine by name, but from its analysis it is clear that this was the law being applied.³⁵

South Carolina appellate courts decided approximately fifteen attractive nuisance cases from *Bridger* in 1886 until *Byrd v. Melton*³⁶ in 1972. Since *Byrd*, no attractive nuisance cases were reported until a split South Carolina Court of Appeals decided *Henson* in 2004. In the time between *Bridger* and *Henson*, it is not evident that South Carolina courts followed the national trends outlined in Part II.A. above. After 1922, South Carolina cases cite *Britt* only once, and it is in a dissenting opinion.³⁷ Further, since the national shift away from *Britt* and towards section 339, the South Carolina Supreme Court has mentioned the much-heralded section only in passing.³⁸ No reported cases show a South Carolina court using section 339 as a starting point for an attractive nuisance analysis.

After a thirty-year hiatus, it appears that *Henson* has successfully revived discussion of this long-dormant doctrine. The thrust of the disagreement between the majority and dissent centers on the historical development of the attractive nuisance doctrine in South Carolina.³⁹ The majority opinion suggests that the rule in *Britt*, though not cited by name, is clearly the law of the state and that Terry was properly denied recovery by the trial court since he was not attracted to the

31. See RESTATEMENT (SECOND) OF TORTS: ARTIFICIAL CONDITIONS HIGHLY DANGEROUS TO TRESPASSING CHILDREN § 339 (1965).

32. SCHWARTZ, *supra* note 19, at 496–97.

33. 25 S.C. 24 (1886).

34. *Id.* at 25.

35. Testimony presented that “the turn-table was a dangerous machine; that . . . was . . . located in an exposed place, easily accessible, unguarded, unfenced, and unlocked; and that the plaintiff was of [the] age when he was incapable of . . . appreciating his danger.” *Id.* at 29.

36. 259 S.C. 271, 191 S.E.2d 515 (1972).

37. *Hart v. Union Mfg. & Power Co.*, 157 S.C. 174, 202, 154 S.E. 118, 125 (1930) (Conthran, J., dissenting).

38. See, e.g., *Byrd*, 259 S.C. at 276, 191 S.E.2d at 517 (citing section 339, among other sources, for the proposition that “liability is imposed on a landowner for physical harm to trespassing children only where the injury is caused by an artificial condition upon the land.”); *Lynch v. Motel Enters., Inc.*, 248 S.C. 490, 495–96, 151 S.E.2d 435, 437 (1966) (stating that “[w]e are satisfied that the evidence was sufficient to have warranted an inference that [injured child] was attracted by the pool. However, . . . this is not a prerequisite to recovery under the law of this case. Furthermore, the ‘attraction’ theory, which has been discredited in most jurisdictions, is of little practical importance. . . .”) (citation omitted); *Everett v. White*, 245 S.C. 331, 338, 140 S.E.2d 582, 586 (1965) (citing section 339 in the last sentence of the decision: “[w]e are satisfied that the complaint states a cause of action against the defendant based upon actionable negligence independent[] of . . . attractive nuisance. In addition to our own decisions which have been cited see . . . Restatement of Torts, Sec. 339.”).

39. *Henson v. Int’l Paper Co.*, 358 S.C. 133, 139–40, 149–57, 594 S.E.2d 499, 502, 507–11 (Cl. App. 2004) (Anderson, J., dissenting).

defendant's property by the canal that caused his death.⁴⁰ Judge Anderson's dissent casts doubt on the majority's reasoning in a number of ways, especially by discussing the doctrine's evolution in South Carolina.⁴¹ Judge Anderson advocates the bifurcation of the doctrine. He believes a child may be on the defendant's property for any reason and subsequently attracted to a dangerous instrumentality.⁴² If that instrumentality constitutes an attractive nuisance and the child is injured by it, the child should be allowed recovery under state common law.⁴³

This Note analyzes the majority opinion in Part III. Part IV discusses Judge Anderson's dissent. While analyzing the dissent's points of contention, other considerations such as practicality and South Carolina public policy are noted. This Note aims to not only address the strengths and weaknesses of each side's position as they relate to South Carolina's modern common law, but also to suggest a pragmatic solution to the newly-discovered schism over the state's attractive nuisance jurisprudence.

III. THE *HENSON* MAJORITY

The *Henson* majority held the attractive nuisance doctrine was not applicable and disposed of the issue quickly.⁴⁴ In a single paragraph, the court held that the trial court's directed verdict as to the cause of action for attractive nuisance was proper, as "[s]ettled law supports what the trial judge did."⁴⁵ The majority further held that since Terry "was not attracted to [IPC's] premises by reason of the canal,"⁴⁶ and since "[t]he attractive nuisance doctrine 'is not applicable where the injured child went to the dangerous situation for some other reason,'"⁴⁷ the trial court's determination was correct.⁴⁸ The majority's conclusions about the attractive nuisance doctrine are based on the South Carolina Supreme Court case *Kirven v. Askins*.⁴⁹

The majority's efficient disposal of the attractive nuisance doctrine in *Henson* indicates the doctrine's applicability is a non-contentious issue. From the majority's discussion, South Carolina case law, lead by *Kirven*, seems to directly support the conclusion that the rule in *Britt* still applies in South Carolina. After reviewing Judge Anderson's dissent, however, the majority's holding appears to be anything but straightforward and the supporting case law looks as if it is not so well-settled.

40. *Id.* at 139–40, 594 S.E.2d at 502.

41. *Id.* at 149–57, 594 S.E.2d at 507–11 (Anderson, J., dissenting).

42. *Id.* at 154, 594 S.E.2d at 510 (Anderson, J., dissenting).

43. *Id.*

44. *Id.* at 139–40, 594 S.E.2d at 502.

45. *Henson v. Int'l Paper Co.*, 358 S.C. 133, 139, 594 S.E.2d 499, 502 (Ct. App. 2004).

46. *Id.*

47. *Id.* at 139–40, 594 S.E.2d at 502 (quoting *Kirven v. Askins*, 253 S.C. 110, 117, 169 S.E.2d 139, 142 (1969)).

48. *Id.* at 139, 594 S.E.2d at 502.

49. *See id.* at 139–40, 594 S.E.2d at 502. The relevant portion of *Kirven* cites *Hancock v. Aiken Mills, Inc.*, 180 S.C. 93, 185 S.E. 188 (1936).

IV. JUDGE ANDERSON'S DISSSENT

A. *An Overview*

The dissent attacks the majority's statement of the law of attractive nuisance.⁵⁰ In the dissent's opinion, a child need not be attracted to the defendant's property by the instrumentality that causes harm.⁵¹ Instead, Judge Anderson reasons, it is enough that a child sustains an injury in his intermeddling with the defendant's dangerous instrumentality, as long as the child is attracted to the instrumentality causing harm.⁵² In short, Judge Anderson does not believe that South Carolina has ever followed the rule in *Britt*, nor does he believe it should.⁵³

Judge Anderson focuses on whether he was attracted to the instrumentality causing injury once on the property rather than how the child arrived on the defendant's property.⁵⁴ The dissent supports its position in a number of ways. First, it calls into question the *Hancock* decision.⁵⁵ Second, the dissent disputes the state of the attractive nuisance doctrine in the time leading up to, and following, *Hancock*.⁵⁶ Lastly, the dissent portrays the doctrine, as enunciated in *Hancock*, as conflicted.⁵⁷ An analysis of the dissent's argument and policy considerations shows that here, Judge Anderson got it right.

B. *The Rule in Hancock as Mere Dicta*

The dissent first attacks the majority's reasoning by attacking the case law purportedly supporting its position.⁵⁸ The dissent attacks the majority's use of *Kirven* arguing that *Kirven* erroneously applied principles from *Hancock v. Aiken Mills, Inc.*⁵⁹ Judge Anderson believes the *Hancock* court already "disposed of the attractive nuisance issue"⁶⁰ by looking to *Sexton v. Noll Construction Co.*,⁶¹ and the rest of the opinion was dicta eventually used in the *Kirven* opinion.⁶² Thus, the dissent believes the *Kirven* court incorrectly applied what amounted to dicta from the *Hancock* case. Since the attractive nuisance issue was already decided, the dissent reasons that any extraneous principles proffered in *Sexton* relating to the doctrine should not be given effect in subsequent decisions.⁶³ The dissent reasons that since the *Kirven* court was in error, so too was the *Henson* majority.⁶⁴ An in-depth analysis of the *Hancock* court's reasoning is necessary to determine whether the *Kirven* court, and thus the *Henson* majority, erroneously applied South Carolina's attractive nuisance doctrine.

50. *Id.* at 147–57, 594 S.E.2d at 504–11 (Anderson, J., dissenting).

51. *Henson v. Int'l Paper Co.*, 358 S.C. 133, 154, 594 S.E.2d 499, 510 (Ct. App. 2004) (Anderson, J., dissenting).

52. *Id.* at 154–55, 594 S.E.2d at 510 (Anderson, J., dissenting).

53. *Id.* at 153, 594 S.E.2d at 509 (Anderson, J., dissenting).

54. *Id.* at 154–55, 594 S.E.2d at 510 (Anderson, J., dissenting).

55. *Id.* at 152–53, 594 S.E.2d at 508–09 (Anderson, J., dissenting).

56. *Id.* at 153–55, 594 S.E.2d at 509–10 (Anderson, J., dissenting).

57. *Henson v. Int'l Paper Co.*, 358 S.C. 133, 156, 594 S.E.2d 499, 511 (Ct. App. 2004) (Anderson, J., dissenting).

58. *Id.* at 151–53, 594 S.E.2d at 508–09 (Anderson, J., dissenting).

59. 180 S.C. 93, 185 S.E. 188 (1936).

60. *Henson*, 358 S.C. at 152, 594 S.E.2d at 509 (Anderson, J., dissenting).

61. 108 S.C. 516, 95 S.E. 129 (1918).

62. *Henson*, 358 S.C. at 152, 594 S.E.2d at 509 (Anderson, J., dissenting).

63. *Id.*

64. *Id.*

In *Hancock*, the defendant's employees started a fire to keep warm, which burned the plaintiff, a twelve-year-old child.⁶⁵ The plaintiff lived in the defendant's mill village where his parent's worked.⁶⁶ The plaintiff ventured outside his home to get some water, and one of the defendant's employees sent the plaintiff on an errand.⁶⁷ Upon returning from the errand, the plaintiff stood in front of the fire with the employees.⁶⁸ While standing there, the plaintiff's clothing ignited, causing severe burns on both legs.⁶⁹

After resolving the issue of agency, the court turned to the defendant's contention that the attractive nuisance doctrine did not apply.⁷⁰ The court makes it clear that the child "was not attracted by the fire itself, but went to it only because [the defendant's employee] called him there on a mission . . ."⁷¹ In the early stages of its analysis, the court hints that this fact may be fatal to the plaintiff's cause of action since in all previous successful attractive nuisance cases "the child that was injured or killed was attracted to play with or play in, or swim in, or wade in, the instrumentality that brought about its injury or death."⁷² The court confirms that the attractive nuisance doctrine is recognized in South Carolina,⁷³ and then turns to an analysis of *Sexton v. Noll Construction Co.*⁷⁴

In *Sexton*, a child was playing on a sand hill on the defendant's property when he came in contact with a boiling pot of asphalt, causing injuries.⁷⁵ The *Hancock* court recounted the reasoning of the *Sexton* court in denying the child's recovery:

The Court held, however, that inasmuch as the child was not attracted by the pot of asphalt but by the sand pile alone, the doctrine of attractive nuisances did not apply, and that the plaintiff could not recover. The Court said . . . "The plaintiff, however, was not playing with the pot at the time of the injury . . . [t]he defendant cannot be held liable under such circumstances . . ."⁷⁶

The *Hancock* court then drew a parallel between *Sexton* and the case at bar: "[E]ven if the fire should be treated as an attractive nuisance—and we cannot so hold—the lure of the fire was not the thing that attracted the plaintiff."⁷⁷ Judge Anderson reasoned in *Henson* that the *Sexton* decision was based "on the lack of attraction to the instrumentality causing injury, not that the child was on the property for another reason."⁷⁸ The *Henson* dissent believes that *Hancock* was decided on the same grounds.

Though the passage from *Hancock* seems to support the dissent's position that "the reasoning of *Sexton* disposed of the attractive nuisance issue," Judge Anderson acknowledges that after this disposal, "the *Hancock* Court cited authorities from

65. *Hancock v. Aiken Mills, Inc.*, 180 S.C. 93, 95, 185 S.E. 188, 189 (1936).

66. *Id.*

67. *Id.* at 96, 185 S.E. at 189.

68. *Id.*

69. *Id.*

70. *Id.* at 100, 185 S.E. at 191.

71. *Hancock v. Aiken Mills, Inc.*, 180 S.C. 93, 100, 185 S.E. 188, 191 (1936).

72. *Id.* at 102, 185 S.E. at 192.

73. *Id.*

74. 108 S.C. 516, 95 S.E. 129 (1918).

75. *Id.* at 519, 95 S.E. at 130.

76. *Hancock*, 180 S.C. at 103, 185 S.E. at 193 (quoting *Sexton*, 108 S.C. at 522, 95 S.E. at 131).

77. *Id.*

78. *Henson v. Int'l Paper Co.*, 358 S.C. 133, 152, 594 S.E.2d 499, 509 (Anderson, J., dissenting).

other jurisdictions in support of its conclusion.”⁷⁹ It is the principle put forth in these cases, that “unless the child goes on the property by reason of the temptation of the very instrumentality, which is held to be the attractive nuisance, he cannot recover,”⁸⁰ that supports the *Henson* majority’s decision. This portion of the *Hancock* court’s analysis essentially states the rule in *Britt* from 1922.⁸¹ With varying degrees of conviction, the nine cases cited in *Hancock* require the child to be attracted to the defendant’s property by the instrumentality causing his harm in order for him to recover.⁸² The crux of the dissent’s argument is that these cases were inserted after the decision on the attractive nuisance doctrine was already rendered and should thus be given little effect.⁸³ However, it is apparent that the *Hancock* court uses the *Sexton* decision and these cases from other jurisdictions to reach a final conclusion on the applicability of the doctrine:

Applying the principles announced in [the nine cases from other jurisdictions] and in our own cases to the facts here, it is perfectly clear that this fire, built by the workmen of the defendant, did not constitute an attractive nuisance. The facts do not make the doctrine of attractive nuisance remotely applicable. There is not the slightest evidence that the plaintiff was drawn to the fire by any childish proclivity for play or amusement, or impelled thereto by any childish instinct.⁸⁴

Therefore, it appears that the dissent is not entirely correct when it states that the *Hancock* court disposed of the attractive nuisance doctrine through *Sexton*. The better analysis is that the court used *Sexton* as the primary basis for its decision, but backed up its findings with out-of-state case law using the rule in *Britt*. A careful reading of *Hancock* supports this proposition since the court does not state that “a verdict should have been directed for the defendant” on the attractive nuisance doctrine until after it connects *Sexton* and the other cases in a preceding paragraph.⁸⁵

However, the dissent may be correct in its other attacks on *Hancock*, especially its belief that the authority from the other jurisdictions “was not necessary to the decision in the case.”⁸⁶ This is distinct from the argument that the issue of attractive nuisance was already disposed of. While the disposal of the issue relates more to the order of the *Hancock* court’s analysis, the necessity of applying the outside case law relates to what the established law was in South Carolina in the time leading up to the supreme court’s 1918 decision. If the supreme court already decided prior to *Hancock* that the attractiveness of the instrumentality is the key question to be decided, then *Hancock*’s holding that the fire was not attractive makes the question of how the child arrived on the property where the fire was located irrelevant. Thus, although the dissent’s proposition that the *Hancock* court already disposed of the attractive nuisance issue through *Sexton* appears to be questionable, an analysis of

79. *Id.*

80. *Hancock v. Aiken Mills, Inc.*, 180 S.C. 93, 104, 185 S.E. 188, 193 (1936) (emphasis added). This portion of *Hancock* is the same portion that *Kirven* cites. That portion of *Kirven* in turn becomes the basis for the majority and the dissent’s disagreement.

81. See *supra* notes 22–23 and accompanying text.

82. *Hancock*, 180 S.C. at 104, 185 S.E. at 193.

83. *Henson v. Int’l Paper Co.*, 358 S.C. 133, 152, 594 S.E.2d 499, 509 (Ct. App. 2004) (Anderson, J., dissenting).

84. *Hancock*, 180 S.C. at 104, 185 S.E. at 193.

85. *Id.* at 105, 185 S.E.2d at 193.

86. *Henson*, 358 S.C. at 152, 594 S.E.2d at 509 (Anderson, J., dissenting).

South Carolina case law in the time surrounding *Hancock* may prove instructive on the dissent's argument that the outside authority was "not necessary to the decision."⁸⁷

C. *Pre-Hancock & Post-Hancock Cases as Conflicting with the Rule in Britt*

The dissent argues that "[p]re-*Hancock* cases demonstrate and post-*Hancock* cases confirm South Carolina has never been one of the few jurisdictions which adhere to [the rule found in *Hancock* and *Britt*]."⁸⁸ The dissent faces an obvious uphill battle, as the disputed language from *Hancock* was used in *Kirven* and cited by the majority.⁸⁹ Nonetheless, it appears that the dissent may be correct, as few South Carolina courts have inquired as to how the child came upon the defendant's property in attractive nuisance cases in the years leading up to, and following, *Hancock*.

1. *Pre-Hancock Case Law*

Starting with *Bridger v. Asheville & Spartanburg Railroad Co.*,⁹⁰ South Carolina courts analyzed the attractive nuisance doctrine in seven reported cases⁹¹ before *Hancock*. The *Bridger* case, decided in 1886, does little more than acknowledge that the attractive nuisance doctrine exists in South Carolina.⁹² There is no in-depth analysis into the intricacies of the doctrine, and little would be gained from an analysis of the case here.

Notwithstanding *Bridger*, the dissent's analysis of pre-*Hancock* cases reveals a common argument: In the time leading up to the *Hancock* decision, South Carolina courts did not consider a child's reason for being on a defendant's property in deciding whether to award recovery under the attractive nuisance doctrine.⁹³ The dissent's assertion appears supported. Before 1936, the outcomes differed, as did the issues the South Carolina Supreme Court deemed relevant. For example, over a fifty-year stint, the court questioned whether a child was capable of appreciating the danger of a turntable,⁹⁴ whether a reservoir played upon a child's "childish instincts and impulses,"⁹⁵ whether an open window⁹⁶ or a pond⁹⁷ could constitute

87. *Id.*

88. *Id.* at 153, 594 S.E.2d at 509 (Anderson, J., dissenting).

89. *Id.* at 139–40, 594 S.E.2d at 502.

90. 25 S.C. 24 (1886).

91. In addition to *Bridger*, there are six other cases: *Hart v. Union Manufacturing & Power Co.*, 157 S.C. 174, 154 S.E. 118 (1930), *Renno v. Seaboard Air Line Railway*, 120 S.C. 7, 112 S.E. 439 (1922), *Sexton v. Noll Construction Co.*, 108 S.C. 516, 95 S.E. 129 (1918), *McLendon v. Hampton Cotton Mills*, 109 S.C. 238, 95 S.E. 781 (1917), *Hayes v. Southern Power Co.*, 95 S.C. 230, 78 S.E. 956 (1913) and *Franks v. Southern Cotton Oil Co.*, 78 S.C. 10, 58 S.E. 960 (1907).

92. *Bridger*, 25 S.C. at 24.

93. The dissent's phraseology and conclusions with respect to these cases are consistent. Judge Anderson commented on *Franks*: "[The] decision did not depend on whether the child was actually attracted to the property on which he was injured"; on *Hayes*: "[t]he decision does not question why the injured child was on the property of the defendant"; on *Hart*: "[t]here was no evidence the child was attracted to the defendant's property because of the existence of the dangerous tower itself"; and on *Sexton*: "[t]he Court based its decision on the lack of attraction to the instrumentality causing injury, not that the child was on the property for another reason." *Henson*, 358 S.C. at 151–52, 594 S.E.2d at 508 (Anderson, J., dissenting).

94. *Bridger*, 25 S.C. at 32.

95. *Franks*, 78 S.C. at 18, 58 S.E. at 962.

96. *Hayes*, 95 S.C. 230, 78 S.E. 956.

97. *Renno*, 120 S.C. 7, 112 S.E. 439.

an attractive nuisance, whether a fence erected by a defendant was a sufficient safeguard,⁹⁸ whether a child was playing with a dangerous instrumentality at the time of his injury,⁹⁹ and whether a defendant had constructive notice of children playing on its property.¹⁰⁰ While each of these different inquiries proved pivotal in deciding whether to award recovery in these particular cases, none of these decisions hinged on the test enunciated by *Britt*, *Hancock*, and *Henson*. That is to say, no pre-*Hancock* South Carolina court investigated the child's motivation for entering the defendant's property when deciding the applicability of the attractive nuisance doctrine.

2. Post-Hancock Case Law

The support garnered for the dissent's argument from pre-*Hancock* case law loses ground in post-*Hancock* cases. Although the dissent asserts that "post-*Hancock* cases confirm South Carolina has never been one of the few jurisdictions which adhere to [the rule in *Britt*],"¹⁰¹ at least two cases applying South Carolina law have held to the contrary.¹⁰²

The dissent's first obstacle is *Kirven*, the case cited by the majority. In *Kirven*, the defendant was constructing a building that was to become the city hall of Darlington.¹⁰³ Dirt clods were prevalent on the land where the construction was taking place.¹⁰⁴ The plaintiff was at the Darlington Recreational Center (Center), located on adjacent property on the day of his injury.¹⁰⁵ The director of the Center told another boy to enter the defendant's construction site to retrieve two children who wandered there.¹⁰⁶ The plaintiff accompanied the other boys and while on the property a thrown dirt clod hit the plaintiff in the eye.¹⁰⁷

In analyzing the plaintiff's claim, the *Kirven* court first held that the dirt clods on the construction site were "not a dangerous thing or instrumentality as is required to establish liability under . . . the attractive nuisance doctrine . . ."¹⁰⁸ The court continued:

In order that liability may be imposed under the attractive nuisance doctrine it is necessary that the condition or instrumentality which caused the injury, should have actually attracted the child into danger . . . In *Hancock* . . ., we held that unless the child goes on the property by reason of the temptation of the very instrumentality, which is held to be the attractive nuisance, he cannot recover. Here, the appellant was not attracted

98. *McLendon v. Hampton Cotton Mills*, 109 S.C. 238, 95 S.E. 781 (1917).

99. *Sexton*, 108 S.C. 516, 95 S.E. 129.

100. *Hart v. Union Mfg. & Power Co.*, 157 S.C. 174, 154 S.E. 118 (1930).

101. *Henson v. Int'l Paper Co.*, 358 S.C. 133, 153, 594 S.E.2d 499, 509 (Anderson, J., dissenting).

102. See *Kirven v. Askins*, 253 S.C. 110, 117, 169 S.E.2d 139, 142 (1969); *Miller v. Perry*, 308 F. Supp. 863, 865 (D.S.C. 1970).

103. *Kirven*, 253 S.C. at 113, 169 S.E.2d at 140.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 114, 169 S.E.2d at 140.

108. *Kirven v. Askins*, 253 S.C. 110, 117, 169 S.E.2d 139, 142 (1969).

to the premises of the respondent by reason of the presence thereon of either the pile of dirt or clods of clay.¹⁰⁹

The *Henson* majority bases its decision on this portion of the analysis citing *Hancock*.¹¹⁰ Judge Anderson attacks *Kirven* by claiming that its application of *Hancock* is not a "correct interpretation of the law of attractive nuisance as it has developed in South Carolina."¹¹¹

The second post-*Hancock* case to apply the disputed test was *Miller v. Perry*,¹¹² decided by the District Court for the District of South Carolina. Notably, neither the majority nor the dissent in *Henson* cited this case.¹¹³ In *Miller*, the court applied South Carolina law in deciding whether the attractive nuisance applied.¹¹⁴ Three brothers ventured onto the defendant's property.¹¹⁵ While on the property, two of the brothers drowned attempting to board a boat located in one of the defendant's ponds.¹¹⁶ The court recounted how the brothers were drawn to the defendant's property:

[One of the brothers] testified that he and his [brothers] walked up the Hartford Road because they heard a bulldozer on J. C. Nichols's place and that when they came to the lane leading to defendant's farm, they decided to see what was down there. They did not know that defendant had any fish ponds and they could not see the ponds until they went almost .4 mile from the Hartford Road.¹¹⁷

In analyzing South Carolina's attractive nuisance law, the district court noted *Kirven*, opining that it "reiterated the rule laid down in *Hancock* . . . , that unless the child goes on the property by reason of the temptation of the very instrumentality, which is held to be the attractive nuisance, he cannot recover."¹¹⁸ Although the *Miller* court ultimately consulted the *Restatement (Second) of Torts* section 339 in making its final decision on the doctrine's applicability,¹¹⁹ its acknowledgment of the rule in *Hancock*, and of *Kirven*'s reiteration of that rule, carries some weight in determining the direction of post-*Hancock* case law. In fact, *Kirven*'s acknowledgment of the rule in *Hancock*, and *Miller*'s assertion that the *Kirven* decision reiterated the rule in *Hancock* could indicate that the *Henson* dissent's argument against the rule in *Britt* is without merit. However, case law beyond *Kirven* and *Miller* shows Judge Anderson's analysis of post-*Hancock* law may serve as the more convincing interpretation.

109. *Id.* (citation omitted).

110. See *Henson v. Int'l Paper Co.*, 358 S.C. 133, 139–40, 594 S.E.2d 499, 502 (Ct. App. 2004).

111. *Id.* at 154, 594 S.E.2d at 510 (Anderson, J., dissenting). Judge Anderson supports his view by showing the contrariety of the proffered law in *Kirven*. This argument will be analyzed *infra* at Part IV.D.

112. 308 F. Supp. 863 (D.S.C. 1970).

113. See *Henson*, 358 S.C. 133, 594 S.E.2d 499.

114. *Miller*, 308 F. Supp. at 865.

115. *Id.* at 864.

116. *Id.*

117. *Id.*

118. *Id.* at 866 (citation omitted) (emphasis added).

119. *Miller v. Perry*, 308 F. Supp. 863, 867 (D.S.C. 1970). The district court, purportedly applying South Carolina state law, used section 339 in its analysis of the attractive nuisance doctrine. *Id.* In using section 339 as the basis for its decision, the district court did something that no South Carolina court has ever done. See also *supra* Part II.B.

Outside of *Miller* and *Kirven*, three South Carolina cases analyzing the attractive nuisance doctrine were decided after *Hancock*.¹²⁰ Arguably, each of these cases supports Judge Anderson's position in *Henson*. Notably, none of these cases explicitly mentions *Hancock*.

The *Henson* dissent cites *Perrin v. Rainwater*,¹²¹ decided two years after *Hancock*, as supporting the position that a child need not be attracted to the premises of the defendant by reason of the instrumentality causing his injury.¹²² In *Perrin*, a seven-year-old child died when she fell from a fire escape located on the third floor of the defendant's building.¹²³ Perhaps the most important part of the *Perrin* decision is that the child was on the defendant's property because "she was a pupil of a dance school kept by [defendant]" and fell "while attending the dance school."¹²⁴ If the South Carolina Supreme Court in *Perrin* applied the rule from *Hancock* and *Britt*, it would have denied recovery.

Daniels v. Timmons,¹²⁵ another case cited by the dissent, also allowed recovery when a child clearly was not attracted to the property due to the nuisance causing injury. The child was injured when he fell from the second floor of the defendant's apartment building.¹²⁶ The fall occurred as a result of "several wickets or uprights [that] were missing on the front part [of the porch], so that there was an opening which was left unguarded and dangerous."¹²⁷ The court allowed recovery under a theory of attractive nuisance even though the child was on the property because he lived there with his parents.¹²⁸ Again, if the court applied the *Hancock* or *Britt* rule, recovery would have been denied.

Judge Anderson also cites *Lynch v. Motel Enterprises, Inc.*¹²⁹ as support for his conclusion. In this case, a "seven year old, mentally defective child" drowned in the defendant hotel's swimming pool.¹³⁰ The case proceeded on two theories of recovery, one of which was attractive nuisance.¹³¹ In holding that the swimming pool constituted an attraction, the court affirmed the trial court's denial of defendant's judgment notwithstanding the verdict and directed verdict motions.¹³² Interestingly, the court did not inquire into the reason for the child's presence on the

120. *Lynch v. Motel Enters., Inc.*, 248 S.C. 490, 151 S.E.2d 435 (1966); *Daniels v. Timmons*, 216 S.C. 539, 59 S.E.2d 149 (1950); *Perrin v. Rainwater*, 186 S.C. 181, 195 S.E. 283 (1938). The South Carolina Supreme Court also decided *Bush v. Aiken Electric Cooperative*, 226 S.C. 442, 85 S.E.2d 716 (1955) and *Everett v. White*, 245 S.C. 331, 582 S.E.2d 582 (1965), in the time after *Hancock*. While in *Bush* the plaintiff's claim was based on the attractive nuisance doctrine, the supreme court's decision hinged on charitable immunity; attractive nuisance was not an issue on appeal. *Bush*, 226 S.C. at 444, 85 S.E.2d at 717. *Everett* verifies that South Carolina recognizes an alternative theory of recovery that parallels the attractive nuisance doctrine. *Everett*, 245 S.C. at 335, 140 S.E.2d at 584.

121. 186 S.C. 181, 195 S.E. 283 (1938).

122. *Henson v. Int'l Paper Co.*, 358 S.C. 133, 153, 594 S.E.2d 499, 509 (Ct. App. 2004) (Anderson, J., dissenting).

123. *Perrin*, 186 S.C. at 182, 195 S.E. at 283.

124. *Id.*

125. 216 S.C. 539, 59 S.E.2d 149 (1950).

126. *Id.* at 550-51, 59 S.E.2d at 155.

127. *Id.*

128. *Id.* at 551, 59 S.E.2d at 155.

129. 248 S.C. 490, 151 S.E.2d 435 (1966).

130. *Id.* at 492, 59 S.E.2d at 435.

131. *Id.* at 493, 59 S.E.2d at 436. The second theory was based on a premise's liability tort developed under *Everett v. White*, 245 S.C. 331, 140 S.E.2d 582 (1965), and *Franks v. Southern Cotton Oil Co.*, 78 S.C. 10, 58 S.E. 960 (1907).

132. *Id.* at 495-96, 59 S.E.2d at 437.

property, nor discuss whether members of the child's family were guests at the hotel.¹³³

3. Conflicting Conclusions

In conclusion, the dissent's argument in *Henson* that "South Carolina has never been one of the few jurisdictions [to] adhere" to the *Britt* rule¹³⁴ is an overstatement. The supreme court, although inconsistent in deciding what factors were relevant in allowing recovery before *Hancock*, never ventured into an inquiry of how a child arrived on the defendant's property.¹³⁵ Further support of the dissent's position is the fact that the supreme court did not make this inquiry in a time when that "position had considerable acceptance,"¹³⁶ between the *Britt* decision in 1922 and the *Hancock* decision in 1936.

Judge Anderson's position meets some resistance from cases decided after *Hancock*. At least two cases applying South Carolina law after 1936 found the reason for a child's venture onto the defendant's property as relevant to the attractive nuisance claim.¹³⁷ Further, these cases cited *Hancock* and yet denied recovery to a child injured on the defendant's property by an object not causing the attraction.¹³⁸ The facts in *Miller* are particularly close to those in *Henson*, and the *Miller* court went out of its way to reject the bifurcation theory.¹³⁹

Some post-*Hancock* law, however, does support the dissent's position.¹⁴⁰ In fact, in terms of sheer numbers, three cases support Judge Anderson's position whereas two support the *Henson* majority.¹⁴¹ The two cases that support the dissent's position, *Perrin* and *Daniels*, are telling, as those cases involve the child's presence on the defendant's property by something other than the object causing the injury.¹⁴²

Nonetheless, the majority's position may, on balance, have more support since the cases supporting its position occurred after *Hancock*. More importantly, *Kirven* and *Miller* were decided in 1969 and 1970, after *Perrin*, *Timmons*, and *Lynch*—the cases upon which the dissent draws its support.¹⁴³ Under stare decisis, one could argue that the trend in South Carolina is towards the position enunciated by the *Henson* majority. A somewhat weaker argument exists that *Kirven*, decided in 1969, actually overruled the supreme court in *Perrin*, *Timmons*, and *Lynch*. Calling the late cases a trend or settled law in South Carolina would be a stretch since these cases were decided over thirty years ago, and modern courts generally reject the

133. *Lynch v. Motel Enters., Inc.*, 248 S.C. 490, 151 S.E.2d 435 (1966).

134. *Henson v. Int'l Paper Co.*, 358 S.C. 133, 153, 594 S.E.2d 499, 509 (Anderson, J., dissenting) (emphasis added).

135. See *supra* Part IV.C.1.

136. See, e.g., RESTATEMENT (SECOND) OF TORTS: ARTIFICIAL CONDITIONS HIGHLY DANGEROUS TO TRESPASSING CHILDREN § 339 cmt. b. (1965) ("At one time [courts often required that a child be attracted onto the defendant's premises by the particular condition which injured him. Although] this position had considerable acceptance . . . it is now generally rejected."); KEETON, *supra* note 18, at 401 (commenting that the classical version of the doctrine "has now been rejected by a large majority of courts, and there remain only a handful of jurisdictions which still adhere to it.").

137. See *supra* Part IV.C.2.

138. See *supra* Part IV.C.2.

139. See *supra* Part IV.C.2.

140. See *supra* Part IV.C.2.

141. Further, one of the majority's supportive cases was not decided by the supreme court, but rather the United States District Court for the District of South Carolina.

142. See *supra* Part IV.C.2.

143. RESTATEMENT (SECOND) OF TORTS § 339 cmt. b.

majority's position in *Henson*.¹⁴⁴ Likewise, the probability that the *Kirven* court intended to overrule the cases conflicting with the *Britt* rule is slim; *Kirven* cited one of the cases on which the dissent relied for its interpretation of the attractive nuisance doctrine.¹⁴⁵

In sum, the dissent's contention that South Carolina has never recognized the *Hancock* rule is off base, since the majority's conclusion is supported by two post-*Hancock* cases.¹⁴⁶ However, the comparatively large number of cases that do not inquire how the injured child arrived on the defendant's property, when such an inquiry would bar recovery, supports Judge Anderson's dissent.¹⁴⁷ Evaluating these competing strengths and weaknesses leads to the conclusion that the case law surrounding *Hancock* is conflicted at best. Therefore, other factors must be considered when determining whether to follow the *Henson* majority or Judge Anderson's interpretation of South Carolina attractive nuisance jurisprudence. One such determinative factor is the practical workability of the doctrine as articulated by both the majority and dissent.

D. The Attractive Nuisance Doctrine, as Described by Kirven and the Henson Majority, Is Inherently Contradictory

One of the dissent's most compelling arguments centers on the "contrariety" of the attractive nuisance doctrine as described by the *Kirven* court.¹⁴⁸ The dissent focuses on the court's recitation of the prerequisites for maintaining an attractive nuisance action. The *Kirven* court held that:

[I]t is necessary that the condition or instrumentality which caused the injury, should have actually attracted the child *into danger*. It follows that the doctrine is not applicable where the injured child went into the dangerous situation for some other reason. In *Hancock* . . . , we held that unless the child goes *on the property* by reason of the temptation of the very instrumentality . . . he cannot recover.¹⁴⁹

Judge Anderson wrote, "[h]ad the Court stopped its commentary [at the first sentence], I would be in total agreement, as this is a correct interpretation However, the Court went on to quote the language from *Hancock*"¹⁵⁰ These comments indicate that the two sentences are in direct conflict, and Judge Anderson uses the facts from *Henson* to illustrate his point.

Explicably, the "instrumentality which caused the injury . . . actually attracted the child to the danger." Terry was attracted to the pipe bridge, and it was the accessibility of this pipe bridge, coupled with the latent dangerousness of the water in

144. *Id.*

145. Both *Kirven* and the dissent cite to *Lynch v. Motel Enterprises, Inc.*, 248 S.C. 490, 515 S.E.2d 435 (1966).

146. See *supra* discussion in Part IV.C.3.

147. See *supra* discussion in Part IV.C.1.

148. *Henson v. Int'l Paper Co.*, 358 S.C. 133, 154, 594 S.E.2d 499, 510 (Ct. App. 2004) (Anderson, J., dissenting).

149. *Kirven v. Askins*, 253 S.C. 110, 117, 169 S.E.2d 139, 142 (1969) (emphasis added) (citations omitted).

150. *Henson*, 358 S.C. at 154, 594 S.E.2d at 510 (Anderson, J., dissenting).

the canal, that created the danger. Furthermore, there is no evidence that Terry went into the dangerous situation, i.e., onto the pipe bridge and into the water, "for any other reason" than his attraction to the water.¹⁵¹

Alternatively, if the second proposition is followed, the fact that Terry was attracted to the dangerous condition has no consequence whatsoever even if IPC knew children often frequented the property. Once it is determined Terry and his friends entered the property without the canal in mind, the analysis ends. To follow this position would undermine nearly every case decided to date in South Carolina.¹⁵²

Judge Anderson's exposure of these two conflicting sentences in *Kirven* illustrates the same problem in what the majority offers, as well as settled law. The majority puts forth the following in denying the plaintiff's recovery:

When viewed in the light most favorable to [the plaintiff], the evidence shows Terry was not attracted to the premises by reason of the canal. He went there for another purpose entirely, i.e., to see "a dirt jumping hill." The attractive nuisance doctrine "is not applicable where the injured child went to the dangerous situation for some other reason."¹⁵³

The majority's decision reveals the contradictory statements of law. These two sentences, much like those in *Kirven*, do not agree.

Under the majority's first sentence, Terry could not and does not recover.¹⁵⁴ However, in trying to further extrapolate the doctrine, the majority inadvertently and indirectly allows Terry a basis for recovery. If the inverse of the second sentence is true—that the doctrine is applicable when the injured child went to the dangerous situation *due to his attraction to it*—then Terry would be able to recover as his injury occurred at the canal, the dangerous situation he was attracted to. The majority's interchanging of "premises" and "dangerous situation" lends support to the dissent's position on *Kirven* and makes Judge Anderson's contrariety exposure applicable in *Henson*.

Showing the contradictions in the *Kirven* and *Hancock* tests illustrate that if such tests are followed in forthcoming cases, the results will differ with no element of predictability.¹⁵⁵ It also tends to show that the *Hancock* and *Kirven* courts' attractive nuisance analysis were laden with confusion. This undercuts the majority's reliance on the cases as statements of South Carolina common law and tends to support Judge Anderson's conclusion that the attractive nuisance test, as stated in these cases, should not be followed.

151. *Id.* at 155, 594 S.E.2d at 510 (Anderson, J., dissenting) (citations omitted).

152. *Id.* (Anderson, J., dissenting).

153. *Id.* at 139–40, 594 S.E.2d at 502 (quoting *Kirven*, 253 S.C. at 117, 169 S.E.2d at 142) (emphasis added).

154. See *supra* note 153 and accompanying text.

155. In fact, using the rules enunciated in *Hancock* and *Britt* interchangeably in the preceding Parts of this Note is probably technically incorrect as the *Britt* decision does not include the contradicting second sentence present in *Hancock*.

V. RESTATEMENT (SECOND) OF TORTS SECTION 339: THE RIGHT DOCTRINE FOR SOUTH CAROLINA

In many tragic stories, such as this one involving Terry Henson, the human tendency is to believe that the law should afford the family of a dead child a remedy when the child's death resulted from some unreasonable act or omission by the defendant. The law sometimes does not follow this human inclination and instead allows results that some may classify as harsh. These legal outcomes, while appearing unwarranted or unfair, usually are reached in order to prevent further, or greater, injustice in subsequent cases decided on different facts—thus, serving a utilitarian function. Times exist, however, when both the law's utilitarian function and its quest for justice can be achieved. The case of *Henson v. International Paper Co.* is one of those times. The South Carolina Supreme Court should overrule the court of appeals' decision for a number of reasons.

First, the majority bases its articulation of the attractive nuisance doctrine on little more than dictum.¹⁵⁶ The majority in *Henson* relies on a statement in *Hancock*, subsequently followed by *Kirven*, which was not necessary to decide the case. The *Hancock* court already determined that the instrument causing the child's harm was not an attractive nuisance and would not subject the defendant to liability when it added the language on which the *Henson* majority relied.¹⁵⁷ While difficult to discount this language as careless, since the *Hancock* court subsequently cited nine *Britt*-type decisions, any offense to stare decisis would be minimal, since the outcome-determinative portion of the decision was already stated.¹⁵⁸

Second, of approximately fifteen South Carolina attractive nuisance cases, the two cited by the majority are the only two that arguably put forth the test enunciated in *Britt*.¹⁵⁹ While evident that Judge Anderson's assertion that South Carolina has never followed the rule in *Britt* is incorrect, *Perrin* and *Timmons* show that the rule has never been consistently followed.¹⁶⁰ In fact, the supreme court easily could reverse the court of appeals. The statements of law in *Hancock* and *Kirven* are not reflected by any other supreme court case decided in the past 100 years.

Third, almost all other jurisdictions reject the majority's statement of law and adopt the section 339 approach. Comment *b* to the *Restatement* states that section 339 is "now accepted by the great majority of the American courts [and is only] rejected in seven or eight jurisdictions . . ."¹⁶¹ To continue this approach would be to move away from the modern trend and take a step back towards 1920s American jurisprudence.

Fourth, and most importantly, there exists a more balanced alternative to the antiquated *Britt* rule. Under this alternative, defendants are not unfairly asked to "be an insurer of children's safety"¹⁶² and children are afforded a remedy if they are injured as a result of a defendant's negligence. The section 339 negligence

156. See *supra* Part IV.B.

157. *Id.*

158. *Id.*

159. See *supra* note 49 and accompanying text.

160. See *supra* notes 121–29 and accompanying text.

161. See RESTATEMENT (SECOND) OF TORTS § 339 cmt. b. The reporter's note to section 339 breaks jurisdictions into three categories: the "small minority" of courts that reject the section (Maine, Maryland, Massachusetts, New Hampshire, New York, Ohio, Rhode Island, and Vermont), the smaller minority, including South Carolina, that still follow *Britt* (Colorado, Indiana, Louisiana, Mississippi, Missouri, South Carolina, and Tennessee), and the remaining "great majority" that reject *Britt* and follow section 339. *Id.*

162. SCHWARTZ, *supra* note 19, at 499.

standard¹⁶³ strikes the perfect balance between a landowner's autonomy and the state's public policy consideration of protecting children. It breaks down the "legalistic and protective" barrier¹⁶⁴ for defendants while reserving punishment only for those that act negligently in maintaining their property. Under the Restatement approach, defendants would be better able to introduce evidence about the likelihood of a child's trespass, the potential costs of keeping children off the property, and other mitigating factors in attempting to show an exercise of due care.

On the other hand, a section 339 standard would provide children with a means of recovery when they should be afforded one. In cases such as *Perrin*, *Daniels*, and *Henson*, children would be allowed a recovery when a defendant has notice of the dangerousness of the property and when a defendant knows that children are likely to frequent the property. Children would be protected from negligent landowners without having to prove their subjective intent for entering the property. In *Henson*, the defendant knew of three other drownings in the canal but failed to put up warning signs.¹⁶⁵ The adoption of the modern rule would require landowners to take due care in maintaining their property in a way to prevent tragedy even for trespassers.

Section 339 has become the majority rule in the United States because it serves the same function as the original attractive nuisance doctrine. The rigid classifications of invitee, licensee, and trespasser are disbanded, and a child is given more protection by the law. This increased protection is appropriate because a child is less able to appreciate dangers inherent in instrumentalities such as canals and is usually incognizant of the fact that entry onto another person's land is trespassing. Section 339 effectively tempers these concerns for trespassing children with protections for defendant landowners who should not be required to "be an insurer of children's safety."¹⁶⁶ Since section 339 produces this effective balance and would provide South Carolina courts with a workable formula in child trespass cases, and since previous South Carolina attractive nuisance decisions are hopelessly conflicted, the South Carolina Supreme Court should reverse the court of appeals decision in *Henson* and remand the case for a determination of IPC's liability based on the factors enunciated in section 339.

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163. The section provides:

A possessor of land is subject to liability for physical harm to children trespassing thereon caused by an artificial condition upon the land if

(a) the place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass, and

(b) the condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, and

(c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, and

(d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved, and

(e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children.

RESTATEMENT (SECOND) OF TORTS § 339.

164. *Henson v. Int'l Paper Co.*, 358 S.C. 133, 157, 594 S.E.2d 499, 511 (Ct. App. 2004) (Anderson, J., dissenting).

165. See *supra* note 11 and accompanying text.

166. SCHWARTZ, *supra* note 19, at 499.